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Gideon Tan v Tey Por Yee and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-1322–08 OF 2015 AND W-02(IM)(NCC)-1323–08 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
24 OCTOBER 2016

C

Evidence — Privilege — Legal professional privilege — Plaintiff in court below obtained leave to initiate committal proceedings against appellant and respondents — Appellant filed application to set aside leave together with affidavit in support — Respondent applied to expunge certain paragraphs and exhibits in appellant's affidavit in support — Whether legal professional privilege applicable to committal proceedings — Whether appellant's right to defend himself in committal proceedings create exception to rule of solicitor-client privilege

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Legal Profession — Professional privilege — Communications — Plaintiff in court below obtained leave to initiate committal proceedings against appellant and respondents — Appellant filed application to set aside leave together with affidavit in support — Respondent applied to expunge certain paragraphs and exhibits in appellant's affidavit in support — Whether legal professional privilege applicable to committal proceedings — Whether appellant's right to defend himself in committal proceedings create exception to rule of solicitor-client privilege — Evidence Act 1950 s 126

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The plaintiff in the court below obtained leave to initiate committal proceedings against the appellant and the respondents on the alleged contemptuous act of interfering with the evidence of one Tjoe, a potential witness. The appellant was an advocate and solicitor representing the respondents in the court below. The appellant then filed an application to set aside the order granting leave for committal ('encl 31') together with his affidavit in support ('the said affidavit'). Subsequently, upon service of the documents to the respondents, the respondents filed two separate applications ('encls 82 and 75') to expunge certain paragraphs and exhibits ('the impugned averments and exhibits') in the said affidavit. The learned judicial commissioner ('JC') allowed encls 82 and 75, hence these appeals. In the present appeals, the appellant did not deny that the impugned averments and exhibits were given under solicitor-client privilege and the respondents never waived their privileges. Nevertheless, the appellant contended that the legal professional privilege was not applicable to the committal proceedings as it

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would allow the respondents to raise privilege to cloak or cover up the illegality, crime and/or fraud. Therefore, it was submitted that the proviso to s 126 of the Evidence Act 1950 had been satisfied.

Held, dismissing both appeals and affirming the decision of the learned JC:

(1) On the factual matrix of the appeals, the exception for communication and/or information from a client pertaining to a future crime did apply here as the communication and/or information had no nexus to any criminal activity; and even if it did, all the said impugned averments and exhibits were in relation to past matters and this was not a case of seeking advice on a future unlawful act. There was no compelling public interest that could justify setting aside solicitor-client privilege. The right of the appellant to defend himself in the committal proceedings did not create an exception to the rule of solicitor-client privilege (see paras 36 & 46).

[Bahasa Malaysia summary

Plaintif di Mahkamah Tinggi memperolehi izin untuk memulakan prosiding komital terhadap perayu dan responden-responden atas dakwaan tindakan tidak menghiraukan dengan campur tangan keterangan seorang bernama Tjoe, saksi yang berpotensi. Perayu adalah peguamcara dan peguambela yang mewakili responden-responden di Mahkamah Tinggi. Perayu kemudiannya memfailkan permohonan untuk mengetepikan perintah membenarkan izin untuk komital ('lampiran 31') bersama dengan afidavit sokongannya ('afidavit tersebut'). Kemudiannya, selepas serahan dokumen kepada responden-responden, responden-responden memfailkan dua permohonan berasingan ('lampiran-lampiran 82 dan 75') untuk membatalkan perenggan-perenggan dan ekshibit-ekshibit tertentu ('hujahan-hujahan dan ekshibit-ekshibit yang dipersoalkan tersebut') di dalam afidavit tersebut. Pesuruhjaya kehakiman ('PK') membenarkan lampiran-lampiran 82 dan 75, maka rayuan-rayuan ini. Dalam rayuan-rayuan ini, perayu tidak menafikan bahawa hujahan-hujahan dan ekshibit-ekshibit yang dipersoalkan tersebut diberi di bawah hak keistimewaan peguam-anak guam dan responden-responden tidak pernah mengetepikan hak keistimewaan mereka. Walau bagaimanapun, perayu berhujah bahawa hak keistimewaan profesional tidak beraplikasi kepada prosiding komital kerana ia akan membenarkan responden-responden membangkitkan hak keistimewaan untuk melitupi atau menutupi kesalahan undang-undang, jenayah dan/atau fraud. Oleh itu, ia dihujahkan bahawa peruntukan kepada s 126 Akta Keterangan 1950 telah dipenuhi.

Diputuskan, menolak kedua-dua rayuan dan mengesahkan keputusan PK yang bijaksana:

(1) Atas matriks fakta rayuan-rayuan, pengecualian untuk komunikasi dan/atau maklumat daripada anak guam berkaitan jenayah masa depan

tidak beraplikasi di sini kerana komunikasi dan/atau maklumat tidak mempunyai neksus kepada mana-mana aktiviti jenayah; dan walaupun ia berkaitan, kesemua hujahan-hujahan dan ekshibit-ekshibit yang dipersoalkan tersebut adalah berkaitan kepada perkara yang lepas dan ini bukan kes mendapatkan nasihat atas tindakan salah masa depan. Tidak terdapat kepentingan awam yang memaksa yang dapat menjustifikasikan pengenepian keistimewaan peguam-anak guam. Hak perayu untuk membela dirinya di dalam prosiding komital tidak membentuk pengecualian kepada peraturan hak keistimewaan peguam-anak guam (lihat perenggan 36 & 46).]

Notes

For cases on communications, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2010–2020.

For cases on legal professional privilege, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2769–2794.

Cases referred to

Blank v Canada (Minister of Justice) [2006] 2 SCR 319, SC (refd)

Bukit Lenang Development Sdn Bhd v Telekom Malaysia Berhad & Ors (No 2) [2014] 6 CLJ 713, HC (refd)

Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14, FC (refd)

HT SRL v Wee Shuo Woon [2016] SGHC 15, HC (refd)

Kuwait Airways Corpn v Iraqi Airways Co [2005] 1 WLR 2734, CA (refd)

R v Cox and Railton (1884) 14 QBD 153 (refd)

R v Derby Magistrates' Court, ex parte B; and another appeal [1996] AC 487, HL (folld)

The Detention of Leonard Teoh Hooi Leong, Re [1998] 1 MLJ 757, HC (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)

Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48, HL (refd)

Legislation referred to

Evidence Act 1950 ss 2, 126, 126(1)(a), (1)(b), 127, 128, 129

Appeal from: Suit No 22NCC-362–09 of 2014 (High Court, Kuala Lumpur)

Wong Hok Mun (Teo Qing Qing with him) (Gideon Tan Razali Zaini) in Civil Appeal Nos W-02(IM)(NCC)-1322–08 of 2015 and W-02(IM)(NCC)-1323–08 of 2015 for the appellant.

Yudistra Darma Dorai (Effa Ruzanna bt Anuar with him) (Raj, Ong & Yudistra) in Civil Appeal No W-02(IM)(NCC)-1322–08 of 2015 for the respondent.

New Sin Yew (Jamie Wong and William Ch'ng with him) (Jamie Wong) in Civil

Appeal No W-02(IM)(NCC)-1323–08 of 2015 for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two interrelated appeals before us: Civil Appeal No W-02(IM)(NCC)-1322–08 of 2015 and Civil Appeal No W-02(IM)(NCC)-1323–08 of 2015. Both appeals arose out of the Kuala Lumpur High Court's decision given on 5 August 2015 (Abu Bakar Jais JC presiding), allowing the respondents' two separate applications ('encls 82 and 75') to expunge certain paragraphs and exhibits in the affidavit in support affirmed by the appellant.

[2] The appellant in both these appeals is Gideon Tan. He is an advocate and solicitor of the High Court of Malaya. The respondents are, respectively, Tey Por Yee and Ooi Kock Aun. They were the appellant's former clients.

[3] At the conclusion of the hearing, we were satisfied that the learned JC had been correct in his decision and consequently we dismissed both appeals with no order as to costs. We now set out the detailed reasons for our decision.

BACKGROUND FACTS

[4] The background facts relating to these appeals have been set out in the decision of the learned JC. We do not propose to repeat them in their entirety, save to highlight the facts that are germane to these appeals.

[5] On 22 September 2014, the plaintiff, Protasco Bhd, commenced an action against the respondents in Suit No 22 NCC-362–09 of 2014. In that action, Tey Por Yee was the second defendant and Ooi Kock Aun was named as the third defendant. They engaged the appellant as their solicitor.

[6] On or about 4 October 2014, the appellant was informed by the respondents that one Tjoe Yudhis Gathrie ('Tjoe') had affirmed several statutory declarations and that Tjoe did not sign the said statutory declarations voluntarily but had been coerced and/or threatened to affirm the same. As a result, the appellant and the respondents went to Jakarta between 15–17 October 2014 to meet Tjoe in order to investigate the matter.

[7] On 24 November 2014, the appellant's firm filed a notice of application to withdraw itself from action as the solicitors for the respondents in this suit, inter alia, due to various differences which caused the firm to be unable to represent them.

[8] On 13 November 2014, the plaintiff obtained leave to initiate committal proceedings against the appellant and the respondents. In the committal proceedings, Tey Por Yee is the first respondent; Ooi Kock Aun is the second respondent and the appellant is the third respondent.

[9] The appellant, in his written submission at p 7, summarised the grounds relied upon by the plaintiff in the application for leave to apply for an order of committal against the appellant and the respondents. We can do no better than to reproduce the same hereunder:

> [4.1] The Plaintiff alleged that the Appellant was in Contempt of Court on 15.10.2014 at the Ritz Carlton Hotel, Jakarta, Indonesia and/or on 16.10.2014 at the Mulia Hotel, Jakarta, Indonesia, in attempting to pervert and/or obstruct and/or defeat the course of justice by interfering with the evidence of Tjoe, a potential witness to the matter pending determination of this Honourable Court. The Appellant, Tey & Ooi are alleged to have by attempting to persuade the said Tjoe to revoke the statutory declarations affirmed by him on 07.08.2014, 29.08.2014 and 26.09.2014 ('the Statutory declarations') and/or to dissuade the said Tjoe from giving evidence in the matter pending determination of this Honourable Court in accordance with the statements made in his Statutory Declarations.
>
> [4.2] The Plaintiff also alleges that the Appellant is in contempt of Court on or about 16.10.2014 when he attempted to pervert and/or obstruct and/or defeat the course of justice by interfering with the evidence of Tjoe, a potential witness to the matter by producing and/or causing the production of a draft statutory declaration to be executed by the said Tjoe. It is claimed that the Draft Statutory Declaration if affirmed, would have contained statements that would alter and/or challenge the accuracy of the sworn statements made by the said Tjoe in his earlier Statutory Declarations.
>
> [4.3] The Plaintiff also claims that the Appellant is in Contempt of Court on or about 16.10.2014 at the Mulia Hotel, Jakarta, Indonesia when he attempted to pervert and/or obstruct and/or defeat the course of justice by interfering with the evidence of Tjoe a potential witness to the matter by asserting unwarranted and extra-legal pressure and and/or attempting to persuade Tjoe to affirm a statutory declaration containing statements which are ejected and/or stated to be untrue or false by the intended deponent and/or that contains statements that would alter and/or challenge the accuracy of the sworn statements made by the said Tjoe in his earlier Statutory Declarations.
>
> [4.4] The Plaintiff alleged that the Appellant, Tey and/or Ooi have committed and have been guilty of Contempt of Court in conspiring and embarking on a common design between the 15.10.2014 to 17.10.2014 to impede and/or to pervert and/or to interfere with the due administration of justice by attempting to procure a statutory declaration the contents of which are rejected and/or stated to be untrue or false by the intended deponent Tjoe.

[10] The appellant then applied to set aside the order granting leave for committal ('Enclosure 31' in the court below). For this purpose, he affirmed an affidavit in support ('Enclosure 32' in the court below).

[11] On or around 9 December 2014, the appellant served a copy of encl 31 together with his affidavit in support to the respondents' solicitors, respectively.

[12] The respondents then proceeded to file two separate applications ('encls 82 and 75') on 17 February 2015 and 16 February 2015, respectively, to expunge the following items in the affidavit in support:

Enclosure 82

(i) Paragraphs 14–20; 22 and 40.2, and

(ii) The documents marked and exhibited as Exhibits 'GT-5, 'GT-7' and 'GT-9'.

Enclosure 75

(i) Paragraphs 13-20; 22; 40.1 and 40.2; and

(ii) The documents marked and exhibited as Exhibits 'GT-5', 'GT-7' and 'GT-9'.

[13] Learned counsel for the respondents has tabulated the impugned averments and exhibits as follows:

PARAGRAPH NUMBER	GIDEON TAN'S AVERMENTS VERBATIM	R/A PAGE
14.	'In particular, the relation is evidenced from the exchange of email between the 3rd Defendant and Dato' Chong in relation to utilizing the above said Deposit sum of RM50,000,000.00 received from SPA1 to pay the dividends accruing under the Share Sale Agreement dated 26.11.2012 (amend to 26.12.2012)'	Vol 2(10) Page 978
15.	The above said email are set out as below and exhibited herein and marked as Exhibit 'GT-5'	Vol 2(10) Page 978
16.	'Furthermore, during the course of acting for kingdom Seekers Venture in a derivative action filed in Kuala Lumpur High Court Suit No. 22NCC-407-10/2014 ('Derivative Suit') and after the Defence was served upon us, it seems that Dato' Chong granted a loan of RM10,000,000.00 to Kingdom Seekers Ventures to assist in the acquisition of Protasco Share from the Vendors pursuant to the Share Sale Agreement dated 26.11.2012'	Vol 2(10) Page 982

17.	From the Defence of Dato' Chong filed in the Derivative Suit, the loan of RM10,000,000.00 was obtained from his company called RS Maha Niaga Sdn. Bhd. On or around 13.12.2012, RS Maha Niaga Sdn Bhd obtained a 2 month short term loan facility in the sum of RM10,000,000.00 from United Overseas Bank (Malaysia) Berhad which was guaranteed by Dato' Chong personally and Protasco Shares were pledged as security for the said facility ('the RS Maha Niaga Loan'). The loan was to be repaid to United Overseas Bank (Malaysia) Berhad by RS Maha Niaga Sdn Bhd sometime on 19.2.2013'.	Vol 2(10) Page 982
18.	'I did not sight any loan agreement signed between Dato' Chong or Kingdom Seekers Venture for the material time in December 2012 when the money was disbursed. However, there is a loan agreement dated a year later i.e. on 10.12.2013 seemingly setting out such a loan with repayment to be made after the completion of the acquisition of PT ASI by Protasco'.	Vol 2(10) Page 983
19.	'Furthermore, from the records I did not see in any documentation and/or any demand made by Dato' Chong to Kingdom Seekers Venture'.	Vol 2(10) Page 983
20.	'From an email between Kenny Chong and Augustone Cheong, the Attorney acting for the 1st Defendant dated 1.2.2012 attached below, it is apparent that Kenny Chong and/or Augustone Cheong were acting together to structure a sham coal contract to extract monies from Protasco and/or its subsidiaries. The sum of RM10,000,000.00 of which was flowed directly to repay the RS Maha Niaga Loan with United Overseas Bank (Malaysia) Berhad. This email was also forwarded to the 2nd and 3rd Defendants'.	Vol 2(10) Page 984-985
22.	'From the paragraphs 6-20 set out above, it is apparent that Dato' Chong, his son named Kenny Chong, various senior management of Protasco together with the 2nd and 3rd Defendants were communication as well as planning together the various contracts and payments. Therefore, there could not be any deception as Dato' Chong, the Group Managing Director and Senior Management were aware of all circumstances'.	Vol 2(10) Page 987

40.2	'Dato' Chong and/or Kenny Chong and/or various senior management of Protasco together with the 2nd and 3rd Defendants were actively involved and/or working together in all the above said transactions. Therefore, there could not be any deception and/or defraud and/or attempt to defraud as pleaded by Protasco in this suit. This however does not mean that collectively, Dato' Chong and the Defendants did not cause loss and damages to Protasco and/or commit any offence under the law'.	Vol 2(10) Page 1000

EXHIBIT	CONTENT	R/A PAGE
GT-5	Exchange of email between the 3rd Defendant and Dato' Chong in relation to utilizing the deposit sum of RM50,000,000.00 received from SPA 1 t pay the dividends accruing under the Share Sale Agreement dated 26.11.2012	Vol 2(11) Page 1109–1112
GT-7	Loan Agreement dated 10.12.2013	Vol 2(13) Page 1239–1244
GT-9	Email sent between parties dated 1.2.2013 and the Coal Supply Contract Agreement dated 4.2.2013	Vol 2(4) Page 1325–1337

[14] The respondents sought to expunge the impugned averments and exhibits on the grounds:

(a) that the impugned averments and exhibits were made in blatant breach of client-solicitor confidentiality/privilege and at all material times, the said privilege has never been waived by them;

(b) that the impugned averments and exhibits are scandalous and spurious; and

(c) that the impugned averments and exhibits are irrelevant to the appellant's notice of application to set aside the ex parte order (encl 31).

[15] On 5 August 2015, the learned JC allowed the respondents' applications to expunge the items in the appellant's affidavit in support as alluded to above. Hence, these appeals.

THE HIGH COURT'S FINDINGS

[16] The reasons given by the learned JC for allowing the items to be expunged may be summarised as follows:

(a) the impugned averments and exhibits fall under legal professional privilege;

(b) the dicta of the House of Lords in *R v Derby Magistrates' Court, ex parte B; and another appeal* [1996] AC 487 ('Derby') holds good in Malaysia; and

(c) legal professional privilege applied in Malaysia by way of ss 126–129 of the Evidence Act 1950, as expounded by the Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14.

[17] The learned JC, after perusing the material on record and examining the applicable law, concluded as follows:

> Therefore it is clear that both under common law and also the position in Malaysia, legal professional privilege is:
>
> (a) absolute;
>
> (b) protected from public interest consideration;
>
> (c) waived only by the clients.
>
> As indicated the information or communication pertaining to the paragraphs and exhibits sought to be struck out in the affidavit of support of the third respondent came from the second and third defendants. At the risk of repetition, there is no dispute that these two defendants had not at any time waived the privilege. Therefore the third respondent is left with no option. He cannot use that information or communication to enact those paragraphs and show those exhibits.

THE APPEAL

[18] The appellant assailed the judgment of the learned JC broadly on the grounds that His Lordship failed to exercise his discretion properly or at all, misunderstood the law and failed to appreciate the relevant factors in allowing the respondents' applications in encls 75 and 82 to expunge the impugned paragraphs and exhibits in the appellant's affidavit in support.

[19] The appellant submitted that the impugned averments and exhibits depict the involvement of Dato' Chong and/or various senior management of the plaintiff together with the respondents of 'wrong doing'. Consequently, legal professional privilege is not applicable to this committal proceedings pursuant to s 126(1)(a) and (b) of the Evidence Act 1950.

[20] In support of his submission, reliance was placed on the decision of *Re The Detention of Leonard Teoh Hooi Leong* [1998] 1 MLJ 757 wherein the court stated:

A solicitor cannot be compelled to disclose legitimate communications, whether oral or written, passing directly between him and client. The privilege, however, does not extend to communication made in furtherance of a fraud or a criminal act. The communication between the detainee and Nor'aishah were no longer privilege as it involved a criminal investigation.

[21] The appellant submitted further that these impugned averment and exhibits are directly relevant to the issue in the committal proceedings against him. As such, the appellant is entitled to raise all reasonable doubt and/or relevant defence available to him in defending the alleged contempt against him. Under such circumstances, the respondents are not entitled to claim legal professional privilege under s 126 of the Evidence Act 1950.

[22] The appellant emphasised that the committal proceedings are criminal in nature since it involves the liberty of the alleged contemnor (see *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849).

[23] The appellant posited that as an officer of the court as well as a party who is prima facie in contempt in the committal proceedings, he has an overriding duty to the High Court to disclose all relevant admissible evidence and material facts which would assist the High Court in arriving at a fair and just decision. The failure to make a full and frank disclosure and/or suppression of any material facts would amount to an obstruction and interference with the administration of justice (see *Bukit Lenang Development Sdn Bhd v Telekom Malaysia Berhad & Ors (No 2)* [2014] 6 CLJ 713).

[24] In order to drive home the point that the respondents are not entitled to claim legal privilege, the appellant referred us to *Sarkar's Law of Evidence*, 15th Ed, at p 2046, wherein the learned author observed as follows:

> *Litigation between Attorney and Client* — It has frequently been held that *the rule as to privileged communications of attorneys does not apply when litigation arise between attorney and client, and when their communications are relevant to the issue* (*Naïve v Baird* 12 Ind 318); and if it is claimed that the attorney has an interest in the pending litigation, for instance that his fee is contingent on the result, he may be required to state such facts, and the communications with his client relating thereto (*Eastman v Kelly* 1 NYS 866). (Emphasis added.)

OUR DECISION

[25] Our law on legal professional privilege is first and foremost statutory. Sections 126–129 of the Evidence Act 1950 govern the extent of permissible

disclosure of privilege communications. These provisions apply to 'judicial proceedings in or before any court in Malaysia', whether civil or criminal in nature (see s 2 of the Evidence Act 1950). A

[26] Section 126 provides that 'no advocate' is permitted, without his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document, or to disclose any advice given, in the course or for the purpose of such employment. Section 129 further provides that no person shall be compelled to disclose to the court any confidential communication between him and his 'legal professional adviser'. B C

[27] Legal professional privilege is a rule of evidence that prevents admission into evidence of certain 'special' type of communication. Its purpose is to encourage full and frank communications between lawyers and their clients and thereby promotes broader public interest in the observance of law and administration of justice. The legal professional privilege recognises that sound legal advice or advocacy serves the public ends and such advice and advocacy depends upon the lawyers being fully informed by the client. It goes without saying that by protecting client-lawyer communications, the client will be more candid and will disclose all relevant information to his lawyer, even potentially damaging and embarrassing facts. D E

[28] Lord Taylor of Gosforth CJ traced the history of the development of this doctrine from its origins in the 16th Century in *Derby* at pp 504–507. At p 507 C–E, he concluded: F

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer will never be revealed without his consent. Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests. G

[29] In *Blank v Canada (Minister of Justice)* [2006] 2 SCR 319, the Supreme Court of Canada had this to say: H

> The solicitor-client privilege ... recognises that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice. I

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[30] In *Anthony See Teow Guan v See Teow Chuan & Anor* the Federal Court upheld the common law maxim that 'once privileged, always privileged'. The court held that the client could waive the privilege but the waiver must be made with express consent and as such Malaysian law does not recognise the common law waiver by implication or by imputation.

[31] The legal professional privilege does not, however, extend to:

(a) any communication made in furtherance of any illegal purpose; or

(b) any fact observed by the advocate in the course of his engagement showing that any crime or fraud has been committed since the commencement of the engagement.

(See proviso to s 126).

[32] The exception to the legal professional privilege finds its modern origin in *R v Cox and Railton* (1884) 14 QBD 153 and was summarised by Longmore LJ in *Kuwait Airways Corpn v Iraqi Airways Co* [2005] 1 WLR 2734 as being that if a person consults a solicitor in furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and the solicitor do not attract legal professional privilege. The principle is not confined to criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interest of justice.

[33] With the above principles in mind, we now proceed to discuss the arguments advanced by the appellant. At the outset, it is pertinent to note that the appellant did not deny that the impugned averments and exhibits were given under solicitor-client privilege and the respondents never waived their privileges.

[34] The central plank of the argument of the appellant is that legal professional privilege is not applicable to this committal proceedings as it would allow the respondents to raise privilege to cloak or cover up the illegality,

crime and/or fraud. Therefore, the proviso to s 126 of the Evidence 1950 has been satisfied.

[35] In our view, a communication is privileged if it is made to a legal adviser by client after the commission of a crime and with a view to his defence; but it is not privilege it if is made before the commission of a crime or wrong and for the purpose of being guided or assisted in furthering or committing it. This is very clear from the illustrations to s 126 that:

> (a) *A.*, a client, says to *B.*, an advocate: 'I have committed forgery and I wish you to defend me'.
>
> As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.
>
> (b) *A.*, a client, says to B., an advocate: 'I wish to obtain possession of property by the use of a forged deed on which I request you to sue'.
>
> This communication being made in furtherance of a criminal purpose is not protected from disclosure. Similarly, the fact observed by legal adviser in the course of his employment, showing that a fraud has been committed since the commencement of his employment is also not protected for disclosure'.

[36] In our view, on the factual matrix of these appeals, the exception for communication and/or information from a client pertaining to a future crime does not apply here for the following reasons:

(a) the communication and/or information has no nexus to any criminal activity; and

(b) even if it did, all the impugned averments and exhibits were in relation to past matters and this was not a case of seeking advice on a future unlawful act.

[37] We agree with the submission of learned counsel for the respondents that the issue in encl 31 revolves around what happened in Jakarta and his interaction with Tjoe. The plaintiff alleged that the appellant and the respondents attempted to interfere with a potential witness — Tjoe. The alleged acts are said to have occurred in Jakarta on 9 October 2014, 15 October 2014, 16 October 2014 and 17 October 2014.

[38] In his affidavit in support to set aside the grant of leave for committal proceedings, the appellant deposed that:

(a) Tjoe's statutory declaration were never mentioned in the plaintiff's statement of claim. As such, the appellant never knew he would be a

potential witness;

(b) he only went to Jakarta on a fact-finding mission;

(c) Tjoe always held legal representation, and thus could not have been 'interfered with'; and

(d) the alleged contempt occurred in Jakarta and the Malaysian courts do not have jurisdiction.

[39] As such, the substratum of this affidavit in reply only need focus on what happened in Jakarta on those dates. The averment as to the relationship between the respondents and the disclosure of documents given by the respondents, and the forming of personal opinion are irrelevant to the appellant's application to set aside the leave. They ought to be expunged.

[40] We agree with the findings of the learned JC that the right of the appellant to defend himself in the committal proceedings did not create an exception to the rule of solicitor-client privilege.

[41] In *Derby* Lord Taylor stated at p 503:

> [It] seems to conflict with the long established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client: once privileged, always privileged. It also goes against the view that the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or defence, and that the refusal of the client to waive his privilege, for whatever reason, or for no reason, cannot be questioned or investigated by the court.

[42] At the root of Their Lordships' determination that the privilege is absolute was the concern that any qualification to the privilege would undermine the fundamental principle that a client must not feel constrained in any way in his communications with his lawyer. Lord Taylor stated:

> ... once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognisable interest' in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.

[43] In *Three Rivers District Council and others v Governor and Company of*

the Bank of England [2004] UKHL 48, the House of Lords stated:

> Certainly in this country legal profession privilege, if it is attracted by a particular communication between lawyers and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done.

[44] In a leading literature, *Confidentiality* by RG Toulson and CM Phipps (Sweet & Maxwell, 3rd Ed 2012), the learned authors stated at para 16–033:

> Again, on the basis of *R v Derby Magistrates Court ex parte B*, if the information given to a solicitor was originally privilege, and if there has been no exception or implied waiver privilege by the client, it is difficult to see how the solicitor may use such information to defend himself even against a criminal charge ...

[45] We are of the view that this long recognised principle should be maintained. The solicitor-client privilege permits a client to talk freely to his or her lawyer secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed. This is a principle of fundamental importance to the administration of justice.

[46] On the factual matrix of these appeals, there is no compelling public interest that can justify setting aside solicitor-client privilege. The right of the appellant to defend himself in the committal proceedings did not create an exception to the rule of solicitor-client privilege. In *HT SRL v Wee Shuo Woon* [2016] SGHC 15, Hoo Sheau Peng JC had this to say:

> 60 The raison d'être of legal professional privilege is that full, free, and frank communication between persons and their legal advisors, without which the effective administration of justice would not be possible, can only take place if such communications can be carried out in confidence (see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [23]). There is a tension between this and the competing public policy consideration that all relevant information be placed before the court in order that accurate adjudication can be carried out. However, the balance between these two competing imperatives has already been struck in favour of the preservation of legal professional privilege ...

[47] Before we conclude, we must say that the solicitor-client privilege is a privilege which the law has been most zealous to protect and most reluctant to water down by exceptions. We strongly feel that it should remain within the parameters as expounded in *Derby*.

A CONCLUSION

[48] In the upshot, therefore, we dismissed both appeals by the appellant with no order as to costs. Deposits to be refunded. We affirmed the decision of the learned JC. So ordered.

B

Both appeals dismissed; decision of learned JC affirmed.

Reported by Dzulqarnain Ab Fatar

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